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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KENNETH LEWIS,

Petitioner,

v.

JOHN MARSHALL, Warden,

Respondent.

Civil No. 11-0613 WQH (POR)

**ORDER DENYING IN FORMA
PAUPERIS APPLICATION AND
DISMISSING CASE WITHOUT
PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has not paid the \$5.00 filing fee and has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a).

REQUEST TO PROCEED IN FORMA PAUPERIS

The request to proceed in forma pauperis is denied because Petitioner has not provided the Court with sufficient information to determine Petitioner's financial status. A request to proceed in forma pauperis made by a state prisoner must include a *signed* certificate from the warden or other appropriate officer showing the amount of money or securities Petitioner has on account in the institution. Rule 3(a)(2), 28 U.S.C. foll. § 2254; Local Rule 3.2. Petitioner has failed to provide the Court with the required signed Prison Certificate. (The proper Southern

1 District in forma pauperis form, which includes the required Prison Certificate, is attached for
 2 Petitioner's convenience.)

3 **FAILURE TO RAISE A COGNIZABLE FEDERAL CLAIM**

4 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner
 5 has failed to allege that his state court conviction or sentence violates the Constitution of the
 6 United States.

7 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
 8 federal habeas corpus claims:

9 The Supreme Court, a Justice thereof, a circuit judge, or a district
 10 court shall entertain an application for a writ of habeas corpus in
 11 behalf of a person in custody pursuant to the judgment of a State
 court only on the ground that he is in custody in violation of the
 Constitution or laws or treaties of the United States.

12 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.
 13 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800
 14 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
 15 under § 2254, a state prisoner must allege both that he is in custody pursuant to a "judgment of
 16 a State court," and that he is in custody in "violation of the Constitution or laws or treaties of the
 17 United States." See 28 U.S.C. § 2254(a).

18 Here, Petitioner claims that he was denied parole despite having met requirements and
 19 receiving psychological treatment for over 24 years. (Pet. at 5.) In no way does Petitioner claim
 20 he is "in custody in violation of the Constitution or laws or treaties of the United States." 28
 21 U.S.C. § 2254.

22 Further, the Court notes that Petitioner cannot simply amend his Petition to state a federal
 23 habeas claim and then refile the amended petition in this case. He must exhaust state judicial
 24 remedies before bringing his claims via federal habeas. State prisoners who wish to challenge
 25 their state court conviction must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c);
 26 Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a
 27 California state prisoner must present the California Supreme Court with a fair opportunity to
 28 rule on the merits of every issue raised in his or her federal habeas petition. See 28 U.S.C.

§ 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court judicial remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.” Id. (emphasis added).

Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

The Court also notes that the statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable

laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

VENUE

Finally, a petition for writ of habeas corpus may be filed in the United States District Court of either the judicial district in which the petitioner is presently confined or the judicial district in which he was convicted and sentenced. *See* 28 U.S.C. § 2241(d); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 497 (1973). Petitioner is presently confined at California Men’s Colony in San Luis Obispo, California, which is within the jurisdictional boundaries of the United States District Court for the Central District of California, Western Division. *See* 28 U.S.C. § 84(c)(2). It is not clear from the petition where the state court conviction Petitioner seeks to challenge occurred. *See id.* Thus, this Court may not have jurisdiction over the matter. If Petitioner wishes to proceed with this case, he must inform the Court where the state court conviction he seeks to challenge took place.

CONCLUSION AND ORDER

Accordingly, the Court **DENIES** the request to proceed in forma pauperis, and **DISMISSES** the case without prejudice. To have the case reopened, Petitioner must, no later than **August 15, 2011**, (1) pay the filing fee or provide adequate proof of his inability to pay and (2) file a First Amended Petition which cures the pleading deficiencies set forth above. For Petitioner’s convenience, the Clerk of Court shall attach to this Order a blank First Amended Petition form and the proper Southern District in forma pauperis form, which includes the required Prison Certificate.

IT IS SO ORDERED.

DATED: 6/20/11


William Q. Hayes
United States District Judge

CC: ALL PARTIES